No. 300. 301. 302. & 303
No. 624. 625. 626. 627.
Nos. 624. 625. 626. 627.

SUPREME COURT OF THE UNITED STATES

October Term, 1899.

Brief of Coulter for Petitioner

THE STYRIA

The Steamship Styria, Antonio G. Scopinich
Claimant-Appellant

Petitioner

Filed May 28, 1900.

James L. Morgan et al.
Libelants-Appellants

The Same
against
Petitioner

Schuyler L. Parsons
Libelant-Appellant

The Same
against
Petitioner

Alfred S. Malcolmson
Libelant-Appellant

The Same
against
Petitioner

John Munroe et al.
Libelants-Appellants

PETITION FOR WRIT OF CERTIORARI

Convers & Kellen
Proctors for the Styria, Petitioner

J. Parker Kellen
Advocate

Office Supreme Court
FILED
MAY 28 1900
JAMES H. McKENNEY
Clerk

Supreme Court of the United States,

OCTOBER TERM, 1899. No. .

The Steamship "STYRIA," ANTONIO G. SCOPINICH, Claimant-Appellant,
Petitioner,
AGAINST
JAMES L. MORGAN *et al.*,
Libelants Appellants.

Notice of Motion.

THE SAME,
Petitioner,
AGAINST
SCHUYLER L. PARSONS,
Libelant-Appellant.

THE SAME,
Petitioner,
AGAINST
ALFRED S. MALCOLMSON,
Libelant-Appellant.

THE SAME,
Petitioner,

AGAINST

JOHN MUNROE *et al.*,
Libelants-Appellants.

Sirs,—Please take notice that the annexed petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Second Circuit, will be presented to the Supreme Court of the United States, on May 28, 1900.

New York, May 22, 1900.

Yours, &c.,

CONVERS & KIRLIN,
Proctors for the Steamship
Styria, Petitioner.

To Messrs. COWEN, WING, PUTNAM & BURLINGHAM,
Proctors for Morgan;

" BOWERS & SANDS,
Proctors for Parsons;

" SULLIVAN & CROMWELL,
Proctors for Malcomson;

" STERN & RUSHMORE,
Proctors for Munroe.

Supreme Court of the United States,

OCTOBER TERM, 1899, No.

The Steamship "STYRIA" ANTONIO G. SCOPINICH, Claimant-Appellant,
Petitioner,

AGAINST

JAMES L. MORGAN *et al.*,
Libelants-Appellants.

THE SAME,
Petitioner,

AGAINST

SCHUYLER L. PARSONS,
Libelant-Appellant.

THE SAME,
Petitioner,

AGAINST

ALFRED S. MALCOLMSON,
Libelant-Appellant.

THE SAME,
Petitioner,

AGAINST

JOHN MUNROE *et al.*,
Libelants-Appellants.

PETITION FOR CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Antonio G. Scopinich, claimant of the Austrian steamship *Styria* respectfully shows unto the Court as follows:

I.—The cases now sought to be brought into this Court involve the determination of a carrier's duty towards a large part of the cargo of a general ship, which has become contraband of war after shipment, after signature of the bills of lading and after the clearance of the vessel for the intended voyage.

They also present for decision the question of the effect and construction of

(a) an exception in the contracts of carriage of "restraints of princes," where the cargo, because of its contraband character, has become liable to capture;

(b) a clause giving the master the right to terminate the contracts of carriage and to land and store the goods at the risk and expense of the shippers or consignees in cases where he considers it unsafe to proceed on the voyage;

(c) a clause giving the master the right to transship, where he has landed and stored contraband cargo to avoid a danger of capture;

(d) a clause limiting the ship's liability to the invoice value of the goods, in cases of a failure to deliver; and,

(e) an agreement made *inter partes*, during the pendency of the causes, providing for a certain disposal of the cargo and credit of the proceeds, which the Court, by reason of an assumed hardship on one of the parties, has refused to enforce according to its terms.

II.—The above four libels were filed June 4 and 7, 1898, in the District Court, for the Southern District of New York, against the Austrian steamship *Styria*, to recover damages for the non-delivery of 2,200 tons of sulphur (fol. 396) which had been shipped on the steamer at Port Empedocle (Girgenti), Sicily, just at the outbreak of war with Spain, on April 21, 22, 23 and 24, 1898 (fols. 393-397), and had been relanded at the port of shipment, after the signing of bills of lading and the clearance of the vessel, because the sulphur had become and then was contraband of war.

The claims under the libels were for a complete breach of the contract to carry and deliver, and the damages alleged were $69,800. The vessel was released from custody under stipulations for value in the sum of $42,500 and interest, an amount in excess of the invoice value of the goods.

III.—The answers of the claimant—similar in all the cases—admit the shipment of certain sulphur by the shippers, as alleged in the libels (but not the quantity); they admit that bills of lading were duly issued therefor; and that the sulphur was not delivered at the end of the voyage. They allege that by reason of the outbreak of war between Spain and the United States, and of the formal declaration by the Spanish Government issued April 25th (fol. 874) that sulphur was contraband of war, it became unsafe, in the master's judgment, to transport the cargo past the coast of Spain and through the

Straits of Gibraltar to New York, during hostilities; and that, accordingly, he relanded and stored the cargo at the port of shipment, on due notice to the shippers, and that he was justified, under the circumstances, in so doing (pp. 26–31).

The agreements had been made to carry *lawful*, not *contraband*, cargo, and on discovery that what all parties had supposed to be lawful cargo, was in fact contraband, or, by acts of Government, had become such, it was relanded as not that which the master had undertaken to carry.

Clauses of the bills of lading, on which the claimant also relied (fols. 31, 32, 40), were:

(*a.*) "Restraints of Princes and Rulers of People * * * excepted" (fol. 742).

(*b.*) "In case of blockade or interdict of the port of discharge, *or if*, without such blockade or interdict, *the master shall consider it unsafe for any reason*, to enter or discharge cargo there, he is to have option of landing the goods at any other port which he may consider safe at shipper's risk and expense, and on the goods being placed in charge of any mercantile agent or of British consul, and a letter being put into the Post Office, addressed to the shipper and consignee, if named, stating the landing and with whom deposited, the goods to be at the shipper's risk and expense and the master and owners discharged from all responsibility" (fols. 756, 757).

(*c.*) "With liberty (in event of steamer putting back to this, or into any other port, or otherwise being prevented from any cause from commencing or proceeding in the ordinary course of her voyage) to ship or trans-ship the goods by any other steamer" (fols. 743, 744).

The bills of lading also provided:

(*d.*) "The shipowner is not to be liable * * * in any case for more than the invoice or declared value of the goods, whichever shall be least" (fols. 40, 753, 754).

The answer further alleged that during the months of August and September the shipowner brought the sulphur forward in the *Abbazia*, another of its vessels, and delivered it to the consignees for sale, not, however, as a delivery in fulfillment of the original contracts, but under the terms and conditions of the following further contract between the parties (fol. 42), namely,

"1. The claimant shall forward the cargo landed *ex Styria*, at Port Empedocle, on the first available steamer from that port to New York, and shall deliver the same to the consignees, upon the terms, and for the freight specified in the original bills of lading, the consignees to receive the same and to pay the agreed freight on right and true delivery; *the goods upon arrival to be sold at current market rates and the proceeds, less charges incurred, to be credited on account of the damages, if any, recovered in these cases* by the libelants.

"2. The claimant shall have a lien on the portions of the cargo to be delivered to the several libelants for the respective amounts of the charges against the respective portions of the brimstone in Sicily, provided the claimant was justified in relanding and storing the cargo at Port Empedocle as and when he did. If it be held that the relanding and storage of the cargo was not justified, then the said brimstone shall be free from any lien on account of the aforesaid charges or expenses, except freight, which is provided for in paragraph first of this stipulation.

"It is the purpose and intent of this paragraph of the stipulation to provide that if the claimant was justified in relanding and storing the cargo as and when he did, he shall have a lien upon the respective consignments for their respective proportions of the charges and expenses against the same, which the libelant would have had to pay (exclusive of the charges provided for in the first paragraph of this stipulation), if they undertook to forward the cargo for their own account.

"3. This stipulation and anything done by any party under it, shall be deemed to be wholly without prejudice in the pending suits, except as herein provided.

New York, August 12, 1898."

The final allegations of the answer were that the libelants had sold the cargo pursuant to the provisions of the foregoing agreement; that the amounts realized on such sales exceeded the invoice price, which was the limit of libelants' recovery for a complete breach of the agreements to carry and deliver, and that accordingly, under the terms of the agreement of August 12th, and of the above clause (*d*) of the bills of lading, the libelants had sustained no additional damages that could be recovered in these proceedings (fols. 173, 174).

IV.—The main facts in the cases are these:

The *Styria* is an Austrian steamship owned by the Austro-Americana S. S. Co.; Burrell & Son, of Glasgow, were her managers (fols. 389, 601, 662). The voyage on which she was bound at the time of the occurrences here in controversy, was from Trieste *via* Sicilian ports to New York. Some general cargo for New York was laden at Trieste (fol. 393). The steamer sailed on her voyage from that port April 16th (fol. 391) bound for Port Empedocle (Girgenti), her second loading port, which she reached April 21st (fols. 393, 394). The loading of sulphur was begun on the same day (fol. 394). Five shippers at that place furnished for shipment about 2,200 tons of sulphur, the cargo here involved, all which was laden on the vessel on or before April 24th (fols. 395-397). Speaking from recollection, the master stated that he thought a lot of about 40 tons, the last of the shipment, was laden on April 25th (fols. 396, 397), but the log (*Morgan's Ex. A*, fols. 489, 490) contains the entry under date of April 24th, "Finished loading about noon."

All the bills of lading were signed and delivered on or before April 24th (fols. 399-404).

The steamer was cleared at the Custom House of Port Empedocle on April 24 (fol. 409). She was then free and clear, all her business with the port was finished, and she was ready to proceed on the voyage.

Meantime, unknown to the master, war had broken out between Spain and the United States.

On April 20th the President approved a joint resolution of Congress recognizing the freedom and independence of the people of Cuba, demanding that the Government of Spain relinquish its authority and government in the Island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters, and directing the President of the United States to use the land and naval forces under his command to carry the resolution into effect (30 *Stat. at L.*, p. 738).

The Spanish Minister at Washington, on the same date, demanded and received his passports (*Foreign Relations*, 1898; *The Pedro*, 175 U. S., at p. 356).

On the morning of April 21st, our Minister at Madrid was informed by the Spanish Minister of Foreign Affairs that the diplomatic relations between the two governments were broken off. He was, therefore, unable to present to the Spanish Government the demand he was instructed to make that the resolutions be complied with on or before the 23d of April (*Foreign Relations*, 1898; The *Pedro*, 175 U. S., at p. 356).

Immediately on receipt of a message from our Minister, announcing the action of the Spanish Government, the Secretary of the Navy, on April 21st, instructed the Commander-in-Chief of the North Atlantic Squadron to institute a blockade of certain ports in the Island of Cuba (*Report of the Bureau of Navigation*, 1898; *Appendix*, p. 175), and on April 22d the President publicly proclaimed this blockade (30 *Statutes*, 1769).

On April 22d the first overt act of war was committed by the capture of the Spanish merchant steamship *Buena Ventura* (*The Buena Ventura*, 175 U. S., 384).

On April 25th the Queen Regent of Spain issued a decree (Rec., pp. 217-219), in which it was recited that a state of war existed between Spain and the United States, and that the treaty of peace and

friendship existing between the two countries was terminated (fol. 867). This decree further stated the principles on which the Spanish Government intended to conduct the war (fols. 868, 874), and contained the following provisions material to these cases:

"ART. V. In order to capture the enemy's ships, to *confiscate* the enemy's merchandise under their own flag, and *contraband of war under any flag*, the Royal Navy, auxiliary cruisers, and privateers, if and when the latter are authorized, will exercise the right of visit on the high seas and in the territorial waters of the enemy, in accordance with international law and any regulations which may be published for the purpose" (fol. 871).

"ART. VI. Under the denomination contraband of war, the following articles are included:

"Cannons, machine-guns, mortars, guns, all kinds of arms and fire arms, bullets, bombs, grenades, fuses, cartridges, matches, powder, *sulphur*, saltpetre, dynamite, and every kind of explosive, articles of equipment like uniforms, straps, saddles and artillery and cavalry harness, engines for ships and their accessories, shafts, screws, boilers and other articles used in the construction, repair, and arming of warships, and in general all warlike instruments, utensils, tools, and other articles, and whatever may hereafter be determined to be contraband" (fol. 872).

"ART. VIII. The Minister of State and the *Minister of Marine are charged to see the fulfillment of the present Royal Decree and to give the orders necessary for its execution*" (fol. 874).

On the same day (April 25th), the President transmitted a message to Congress, suggesting the advisability of a formal declaration of war (*Messages and Papers of the Presidents*, Vol. 10, p. 154), and thereupon the Congress passed and the President approved the following act, namely:

"AN ACT declaring that war exists between the United States of America and the Kingdom of Spain.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:*

"FIRST: That war be, and the same is hereby, declared to exist, and that war has existed since the twenty-first day of April, *anno domini* eighteen hundred and ninety-eight, including said day, between the United States of America and the Kingdom of Spain.

"SECOND: That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States to such extent as may be necessary to carry this Act into effect.

"Approved April 25, 1898" (30 *Stat. at Large, Pt.* 2, *Ch.* 189).

On April 23d, at 11 P. M., the master received a cablegram from his managers in Glasgow, who were better informed of the course of events than he was in Sicily, "not to sail until the receipt of further instructions" (*Morgan's Ex. A, Log, Entry of April 23d*, 1898). On the 25th he received a further message "to discharge whole cargo quickly as possible" (*Morgan's Ex. A, Log, Entry, April 25th*).

The relanding of the cargo was also in accordance with the master's own judgment, based on the information available to him in Sicily (fols. 411, 412, 413, 426, 458-60, 491-492, 493, 537). On this point he said:

"In fact I didn't bring it because I could see through the newspapers that it was contraband of war although I acted on the owner's instructions to land the goods for I would never have sailed with such a cargo because I might be caught here by the enemy—your enemies I mean (fol. 412).

"Q. Did you as a matter of fact, consider it safe to bring brimstone?

A. No, I did not think it safe. When you see in the papers the ships are stopped with sulphur you would not call it safe" (fol. 537).

The work of discharging and storing the sulphur was begun on April 27th, and was finished at noon of May 7th (fols. 437, 439; *Log, Morgan's Ex.* "*A*," *Entry* May 7th).

Prior to commencing the discharge, the master, in accordance with clause (*b*) of the bill of lading (*ante*, p. 6), sent registered letters in the following form to each of the shippers, and also to the consignees, where named:

"PORT EMPEDOCLE, 27th of April, 1898.

"On finding risky my passage to New York, with the actual sulphur cargo, for facts of war, I give you notice that I am discharging your cargo for your own account and risk, under care of the mercantile agent, Mr. William Peirce, depositing the same in the warehouses of Mr. Zenobia Urso, and if these are not sufficient, in the warehouses of the British Consulate, faculty which I have in force in the bills of lading.

"With my kindest regards, etc.,

"ANTONIO G. SCOPINICH,
"Master Austrian Steamer *Styria*"
(fol. 427).

On completion of the unloading of the sulphur, the master sent to each of the shippers a registered postal card containing the following notice:

"EMPEDOCLE, 7th May, 1898.

"Referring to my letter of the 27th last, by which I gave you notice that the parcel of sulphur loaded by you on board the Austrian steamer *Styria* for New York, is laid at the risk and expense, in the warehouses of Mr. Zenobio Urso here, and as soon as you will pay the expense here made for your account, in conformity with the bills of lading, the said sulphur will be delivered to you" (fol. 443).

On the same day he sent registered postal cards containing similar notices to such of the consignees as were named in the bills of lading (fol. 445).

The steamer was again cleared from the Custom House of Port Empedocle on May 7th, and in the early morning of the 8th she proceeded on her voyage towards New York with the cargo laden at

Trieste, but without any of the sulphur that had been shipped at Port Empedocle (fols. 535, 447, 448). Some additional cargo was shipped at Messina and Palermo. She finally left Sicily on May 9th (fol. 449).

Up to the time of the steamer's departure no official or public statement was issued under or by authority of the Spanish Government, removing sulphur from the list of contraband articles (fols. 467, 468, 469, 474, 495, 498, 499, 500, 527, 532, 533, 534, 550, 575, 579). In point of fact, the *Spanish Government never issued any official or public declaration removing sulphur from the list of contraband*, or in any manner taking it out of the scope of her proclamation of war (fols. 849, 834).

It appears, however, that on May 6th the Spanish Minister of Foreign Affairs informed the Italian and the British Ambassadors that, *as a temporary measure*, commanders of the Spanish vessels *would be* instructed to respect sulphur ships (fols. 838, 842, 863). When such orders actually *were* given, does not appear. On May 31, for the first time, the Spanish Government informed the two Ambassadors that these orders would not be changed without previous notice (fols. 843, 851). The Spanish Government refused to make any public announcement on the subject, and the master had no official information of the private agreement until after the ship's arrival in New York.

The managers of the vessel, Burrell & Son, first heard of the temporary agreement on May 10th, the English Foreign Office informing them that the Spanish Government laid stress on the fact that the arrangement was temporary only (pp. 202-203).

On May 12th, they telegraphed to the Foreign Office in London as follows:

"Referring to your telegram to us of tenth inst., it is rumoured that Spanish Government yesterday declared sulphur non-contraband, kindly wire whether temporary relaxation you reported has been made permanent or still remains temporary" (fol. 814).

And on the same day they received from the Under Secretary of State an answer saying, "No later information received" (fol. 816).

They did not learn of the promise that the temporary arrangement would not be revoked without previous notice until June 5th, after the ship's arrival in New York (fols. 821, 823, 825, 843).

There was no evidence of any opportunity to transship the cargo earlier than was done by the *Abbazia* under the stipulation of August 12th.

Shortly after the *Styria's* arrival on June 3, 1898 (fol. 448), the above libels were filed, as before stated.

The master testified that though directed by the owners to discharge the sulphur, he knew it was contraband (fols. 452, 453, 471), and that Spain so regarded it (fols. 453, 454, 473, 501); that he did not deem it safe to proceed with the sulphur (fol. 537); that without the owners' instructions he would not have sailed with it without knowing certainly that sulphur was free (fol. 502); that he knew war existed between Spain and the United States, and had heard that a blockade of New York was going on (fol. 462); that his course lay along the Spanish coast and by the Spanish lighthouses (fol. 413); that it was reported in Sicily that Spanish men-of-war were looking for ships along this coast, and that he believed the report (fols. 493, 494); that the newspapers in Sicily reported the capture of a sulphur ship (fols. 501, 523), and that up to the time he left Sicily there was no public or official declaration that sulphur had been excluded by Spain from the list of contraband goods (fols. 452, 467, 474, 499, 500, 534).

The master's testimony on these matters is undisputed.

V.—Brown, *J.*, held that the exceptions (*a*) and (*b*) of the bills of lading, quoted above (p. 6), were applicable to the case, but that the master's right under them could not be exercised without waiting a reasonable time to see whether the danger of continu-

ing the voyage with the sulphur might not be removed by negotiation between the Italian and the Spanish governments (*Opinion*, fols. 941–947); that such a reasonable time would have been until May 10th, two weeks after the discharge was begun; that the claimant could derive no advantage in the present case under the transshipment clause (*c*); that accordingly the libelants were entitled to decrees in their favor, but that under clause (*d*) their damages should be limited to the invoice value of the sulphur with the freight added (fols. 952, 1177–1179) against which should be credited, under the stipulation of August 12th, the net proceeds of the sale of the cargo, as a charge to be deducted in ascertaining such proceeds (fols. 952–953, 1178).

On this basis, decrees were entered in favor of Malcolmson for $1,186.11 (fol. 1195); of Morgan for $280.48 (fol. 1184); of Munroe for $563.99 (fol. 1201); of Parsons for $235.36 (fol. 1190); total $2,265.94.

VI.—The grounds on which the District Judge's decision proceeded, as regards *liability*, were these (p. 236):

"Though exceptions (*a*) and (*b*) above noted in the bill of lading contemplate circumstances of war and are therefore applicable in the extraordinary circumstances that arose, still the carrier is not thereby relieved from the duty of acting with reasonable prudence for the interests of all concerned. The master as the agent of all concerned is still bound to a prudent regard for the interests of the cargo, and 'must endeavor to hold the balance evenly' between ship and cargo when their interests conflict (The *Julia Blake*, 107 U. S., 418, 427–8, 431; The *Spartan*, 25 Fed., 44, 56–58; *L'Amerique*, 35 Fed., 844–5; *Cargo ex Argos*, L. R., 5 P. C., 134, 165; *Noble* v. *Jenkins* (1896), 2 Q. B., 326, 331–2).

"The sulphur being generally regarded as contraband of war, and also within the express terms of the Spanish proclamation, a voyage through the Mediterranean, past the coast of Spain and through the Straits of Gibraltar would presumably be pecuniarily dangerous to the cargo, even though the

vessel, as a neutral, might not be liable to condemnation as prize. In case of seizure, however, the shipowner would suffer from the considerable delay incident to the seizure though she were ultimately released. Except, therefore, for the negotiations immediately entered on for procuring an exception of sulphur from contraband, I have no doubt that it would have been both the right and the duty of the master for the interests of the cargo as well as of the ship, to refuse to sail with this cargo after clearing on April 24th until there was some reasonable assurance of safety. See the *San Roman*, L. R., 3 Adm. & Eccl., 583, where there was a delay of three months. The discharge and storage of the cargo, however, was an act necessarily involving considerable expense to the shipper or consignee; and before imposing such an expense upon the cargo, the master in my judgment was bound in view of the daily reports of current negotiations and the expectations of the exception of sulphur, to wait a reasonable period for satisfactory assurances in that regard.

"No doubt any delay entailed some loss upon the ship, and what should be deemed a reasonable period ought to be determined with reference to the circumstances and interests of both. But taking the circumstances altogether, I am of opinion that the commencement of the discharge on the 27th was too hasty and precipitate, and that the master was guided in that matter by the telegram from Burrell & Son, the managing agents in London, rather than by his own judgment on all the circumstances known to him at the time. Had he been left to exercise his own judgment, I do not think, upon the testimony, that he would have discharged the cargo- especially not at the time he did; and that before he left Italy, although there was no formal publication of the exception of sulphur, there were such informal assurances coming from the Spanish Government as left no reasonable apprehension of danger from sailing with a sulphur cargo.

"I must find, therefore, that the ship was not justified by clauses (*a*) and (*b*) of the bill of lading above quoted in discharging and storing the cargo on account of the shippers, as she did, between April 27th and May 7th; that by the 10th of May there was reasonable assurance that it would be safe to go on with the voyage, and that this was not an un-

reasonable time for the ship to wait under the facts and circumstances currently known in Sicily at that time. In *Noble* v. *Jenkins, supra*, the facts were otherwise (fols. 943-947)."

VII.—The measure of *damages* under the bill of lading clause (*d*) was held to be the invoice value and freight (fols. 952, 953), and was more fully dealt with by the District Judge in his opinion overruling the exceptions to the Commissioner's report in the case of Morgan (fols. 1177-1180).

The Commissioner found that there was a complete breach of contract, but that the damages were limited to the invoice value, by clause (*d*) (pp. 274-278). Against the damages so limited were to be credited the net proceeds of sale (including freight as a charge against the goods in ascertaining such net proceeds). On those principles the Commissioner stated the damages in that case as follows:

Invoice value of the consignment			$4,279 00
Proceeds of sale	$4,513 46		
Weighing	$24 40		
Freight	354 98		
		379 38	
			4,134 08
Balance			$144 92

for which, with interest, recovery was allowed (fol. 1111).

The libelant Morgan excepted to the report because:

"III.—Said Commissioner adopted an erroneous method of assessing the damages, the true measure of damages being the difference in the value of the sulphur at the time and in the place it should have been delivered, viz.: June 3d, 1898, at New York, and at the time of its actual delivery in October, 1898.

"IV.—Said Commissioner erred in holding that the clause in the bill of lading limiting liability to the invoiced or declared value of the goods was applicable to the case.

"V.—If said clause does apply, said Commissioner erred in his interpretation of it, the true meaning of the clause being that cargo owners may recover up to, but not beyond the invoice value of their goods" (fols. 1135, 1136).

The opinion of Brown, *J.*, overruling these exceptions, was as follows:

"By the contract of the bill of lading the invoice value is the basis of settlement of any loss or damage; and a construction seems to me impossible, and in fact absurd, that would call for the same payment on a partial loss as upon a complete destruction of the goods. Hence [here?] the special agreement made pending the action further limits recovery.

"No freight was due except upon delivery at New York. Clause 2 of the stipulation recognized the freight as a lien incurred and charged upon the goods by the transportation. It was immaterial whether this lien for freight was paid before or after the sale. If not paid before sale it must have been paid *out of the proceeds* of sale, and if paid by the consignee before sale, it was paid as a lien or charge incurred upon the goods, in accordance with both clauses of the stipulation and *hence to be deducted from the amount of proceeds of sale to be credited to the claimant against the whole damages, i. e., the invoice value as limited by the B/L which was adopted in the stipulation* (The *Hadji*, 18 F. R., 489; affd. 20 F. R., 875; approved in The *Lydian Monarch*, 23 F. R., 298, 300).

"There was no conversion of the goods; only a mistaken theory of the contract rights and duties. It was the owner's duty to transport the goods and the consignees to pay the freight, and that was ultimately done by each.

Commissioner's Report affirmed" (fols. 1177, 1178, 1179, 1180).

The damages in the three remaining cases were afterwards adjusted in accordance with the principles enunciated in the test case of Morgan. The decrees in all the cases amounted to $2,265.94 (*ante*, p. 15).

VIII.—The libelants appealed to the Court of Appeals on the question as to the proper measure of damages (pp. 322–325); and the claimant appealed on the merits (pp. 327–334).

The Court of Appeals reversed the decrees below, both on the merits and as to the measure of damages, and entered orders which in the result are more favorable to the libelants than the decrees below, to the extent of about $25,000, as nearly as can be stated on this record (*Opinions*, pp. 338, 263; *Orders*, pp. 365 *et seq.*).

IX.—The Court of Appeals decided that with 2,200 tons of contraband cargo, the continuation of the voyage, which would lead the ship along the coast of Spain and through the narrow Straits of Gibraltar close by the Spanish naval base, would necessarily be attended by a danger of capture, which it was the master's duty to avoid, and that accordingly under the exception of Restraints of Princes and Rulers, he was justified in landing and storing the cargo as he did on April 27th (pp. 341–345).

But the Court further held that before he sailed finally from port and on May 6th, a newspaper in Sicily printed what purported to be a telegram from the Italian Minister of Agriculture to the Chamber of Commerce at Palermo, to the effect that, at the request of the Italian Government, the Spanish Government had given notice to the commanders of its vessels to let sulphur pass free; and that, although it is undisputed that there was no official confirmation of this message, and that such orders, if given, were liable to be revoked at any moment, and that vessels or their cargoes, on voyages, would thus be liable to capture, the master was bound to rely on the correctness of the newspaper report, to reload his contraband cargo and to proceed with it, and, if captured, to look to the *Italian* Government for indemnity (pp. 346–348).

This conclusion was reached in face of the conceded facts that the *Spanish* Government

was the one that held sulphur to be contraband, and gave notice that it would be captured under whatever flag, and that the *belligerent* Government distinctly refused to modify its proclamation publicly or to make any statement or declaration which the Austrian master or shipowners, or the English managers knew of, until June 5th (fols. 811, 842, 843, 452, 467, 474, 499, 500, 534). Not until May 31st did the Spanish Government make any official promise to anybody, so far as the record discloses, that the temporary promise given to the Italian and English Ambassadors on May 6th to let sulphur pass, would not be revoked without notice and without prejudice to ships already on their voyages when the revocation took place (fols. 842, 843, 851).

The reasoning of the opinion on this branch of the case is thus stated by Lacombe, *J.* (p. 346).

"On May 25th the *Giornale di Sicilia*, a newspaper published at Palermo and which the Captain saw from day to day stated that Messina merchants had asked their Parliamentary Deputy to urge the Government to co-operate to exclude brimstone from being considered contraband. From day to day thereafter the paper was filled with reports and rumors as to the progress of this movement to secure exemption. But down to the 6th of May, not one of these reports bore the stamp of authority; no one vouched for their accuracy. The statements in the clippings from the newspaper which have been printed in the record are merely the expression of the beliefs and expectations of its correspondents in Rome, or elsewhere, furnishing copy to a paper published in a community where an intense interest was felt in having sulphur exempted. There was no reason why it should be exempted; it is a variety of merchandise such as always has been contraband, its exportation to the United States might well be considered an "aid" to Spain's enemy, no one appears to have suggested that the United States concede the same exemption. On the one hand it might be urged that it would please the government and people of Italy to grant the request, but on the other hand, in the case of merchandise so highly contraband, neither the Italian Government nor people

could justly take offense if Spain should insist on exercising the rights which international law accords to every belligerent. Enlightened by the information now made known, we can see that the hopeful prognostications of the writers for the Journal of Sicily were well founded, but there was nothing to give any such assurance at the time they appeared. We should hesitate to hold that it was the duty of a master under similar circumstances to delay action on the expectation that a belligerent would voluntarily abandon one of its weapons, on no better assurance that such action would be taken than the statements of anonymous and irresponsible contributors to a newspaper published in a community which is extremely solicitous that such action be taken.

"By May 6th, however, the situation changed. The Journal of Sicily published an official declaration from the Italian Minister of Agriculture, Industry and Commerce, as follows:

"'Chamber of Commerce, Palermo: I inform the Chamber of Commerce for the useful information of merchants, that by the decree of April 23d of the Spanish Government, are considered as contraband of war, arms, projectiles, fuses, powder, sulphur, nitre. * * * I would also state that in consequence of our request, the Spanish Government has given notice to the commanders of its vessels to let sulphur pass free. (Signed). The Minister Coeco-Ortu.'

"Here was an official declaration which the master should have accepted as sufficient. The Italian Government, through a Cabinet Minister, announces that official action has been taken by the Spanish Government, the practical result of which was to make sulphur free from capture. It matters not that the Spanish Government might thereafter reconsider this decision and direct its cruisers to seize sulphur, because it was to be assumed that cargos taken out in reliance upon the proclamation of the Italian Government would be respected. If they were not the Italian Government would have good ground for claiming indemnity from Spain, and a *casus belli* in case of its refusal.

X.--The central fact, in some degree lost sight of, in the decision is, that the *Spanish* Government created and declared the peril, while the assurances

that it had been removed, vague and uncertain as they were, came not from Spanish, but from *Italian* sources.

Such assurances were of the nature of hearsay. Naturally it was for the interest of the Italians to continue the export of their sulphur, and to create the impression that it could be done with security to the carrying vessels. All statements emanating from Italian sources must be weighed with regard to that fact. No doubt the Italian Ambassador began his negotiations promptly. But there was never, from first to last, a word of assurance of safety, coming from Spanish sources, that was communicated to the master of the *Styria*.

The first word on the subject that reached the shipowners from the Spanish Government, came on May 10th, when the Secretary of the British Embassay at Madrid telegraphed them that "orders have been given not to treat sulphur *for the present* as contraband of war." But on the same day they received a telegram from the Under Secretary of State, at the Foreign Office in London, saying,

"Spanish Government state that *decree* already issued *cannot be altered*, but that as temporary measure naval departments have been ordered not to treat sulphur as contraband of war. They *lay stress on the fact that the measure is temporary only*" (fols. 811, 842-843).

This was three days after the landing of the cargo at Port Empedocle had been completed (fol. 439), and one day after the ship had finally sailed from her last loading port in Sicily (Palermo), on May 9th (fol. 448).

If this information had been received in time, it would have fallen short of such an assurance as a carrier should have, to justify him in proceeding under such conditions with the transportation of a large mass of contraband cargo. If, with knowledge of a formal proclamation that sulphur was contraband, and of an official statement that the

Spanish Government refused to alter the decree, but merely directed, as a temporary measure, revocable at will, that sulphur should not be treated as contraband, the ship had proceeded on a voyage and the temporary order had been revoked, and the ship seized, can it be doubted that the owners of the *lawful* cargo would have had a valid claim for their damages? Could not they have justly said, "You knew sulphur was contraband; you had authority under the bill of lading to land and store it; and yet, without an assurance of safety, you took the risk of the revocation of a temporary order, and hence should pay us the damages resulting from the risk?" (*Holladay* v. *Kennard*, 12 Wall., 254).

So far as the record shows, no assurance was given by the Spanish Government that the temporary orders would not be revoked, without previous notice, until the 31st of May (fols. 842, 843, 851).

It is an important circumstance that the shippers who protested to the master against the discharge of the cargo at the port of shipment, never claimed that the reported agreement that sulphur might pass with safety was officially confirmed, and never offered to assume the risk of capture, or to give the master any indemnity against the risks incident to proceeding on the voyage with the sulphur. It is also significant that these protests, on their face, show that the shippers had no interest in the cargo, the title having apparently passed to the consignees on shipment, and that the consignees made no representations to the master on the subject. The master's counter protest served the 11th of May (fols. 893-94) shows that it was not understood, up to that date, that sulphur could be carried with safety. In point of fact, the substance of the statements in the protests of the shippers, made at the time, are no different in effect from the testimony of the master that nothing better than rumors were current up to the time he left Sicily.

The suggestion that the captain should have relied on the newspaper report of a message from the

Italian Minister of Commerce, to the effect that sulphur could go free, and should have looked to the Italian Government for indemnity in case he was captured, was not discussed in either court by counsel, but was first volunteered by the Court of Appeals in its opinion. With all submission it seems doubtful, at the least, whether there would have been the slightest ground of claim against the Italian Government on the facts assumed. It is not known, even now, whether the message quoted was genuine or not. It has never been verified. Moreover, it was not a "proclamation," as the Court calls it, nor was it in any sense "official." It was not addressed to any foreign subjects nor to the Italian people generally. It was merely a news item sent to a local body of merchants in Palermo, a different port from that where the ship lay, and was only intended, as it says, "for the useful information of merchants." Its obvious purport was simply to inform them that they might continue shipping sulphur without infringing their duties as neutrals, provided ships could be found whose owners were willing to risk capture in transporting it.

It is going too far to say that a master who is under a legal duty to avoid a risk of capture (*Holladay* v. *Kennard*, 12 Wall., 254), should base his action in assuming such a risk on an unconfirmed newspaper report, which was admittedly erroneous, if genuine, in that it omitted to state the qualification that had been privately made to the ambassadors, that the privilege was "a temporary measure" only (fols. 811, 838, 842).

The master's view of this incident was more reasonable and prudent, it is submitted, than that adopted by the Court:

"Q. But the day before you sailed, on the 7th, you did read in the papers that the Governments had come to an agreement—to an understanding? A. Yes; not to an understanding, *not to a safe understanding, but a temporary understanding*, you know.

Q. To the effect that sulphur temporarily would not be treated as contraband of war? A. Yes.

Q. In spite of the previous proclamation. That was so, was it not? A. Yes, but the papers said not officially confirmed, you see. *That meant, of course, they could withdraw it any moment*" (fols. 578, 579).

In effect the theory of the Court makes the captain assume a risk whether he brought the sulphur on or whether he stored it. If he brought it on he ran the risk of capture and of facing claims by the owners of the lawful cargo for their damages consequent on his action, and to make himself whole he is put to his doubtful action over against the Italian Government by reason of having relied on its assurances to his damage. If, however, he failed to bring the sulphur forward he subjected himself to claims as here, for this very failure, though it was necessitated by his duty to his other shippers. To put the master in a predicament from which he cannot be relieved by the exercise of the greatest prudence is most unreasonable and unfair. It is a situation which, it is believed, did not exist in this case.

Even if the master might have had a claim against the Italian Government for idemnity in case he had acted to his prejudice in reliance on the message of the Minister of Agriculture, dated May 6th, yet it was error for the Court to hold that in determining the question of his duty, the master was bound to guide his conduct with reference to such an ultimate indemnity in case his decision proved to be wrong. His obligations were to the shipowners, to the owners of the lawful cargo already on board his vessel and of that to be shipped at the other ports of loading, and to the contraband cargo.

From the finding of the Court that a risk of capture existed which it was his duty to avoid, and that, in accordance with such duty, he was justified in relanding the cargo and leaving it in store at least until its reshipment again became safe (pp. 342-344), the con-

clusion should have followed that he was not bound to reship until the circumstances that created the peril, namely, the risks arising from the existence of war, the contraband character of the sulphur, and the public proclamation of the Spanish Government of its intention to confiscate such cargo under any flag, were removed by acts and circumstances at least as formal and public and as unmistakably originating from the Spanish Government as the acts and circumstances which, admittedly, had created those risks.

It is conceded by the Court of Appeals that the provisional arrangement alluded to in the message of the Italian Minister of Agriculture, of May 6th, was subject to revocation without notice, and to the prejudice of vessels afloat at the time of such revocation, and that if the *Styria* had proceeded on the voyage with the sulphur and had been captured prior to the 31st of May, when, for the first time, the Spanish Government promised that the revocation of its orders to let sulphur pass should not be made without notice, the ship would have had no defense to the claims for damage that would have been made by the owners of the lawful cargo. As a large part of that cargo was to consist of green fruit, it is manifest that the detention necessarily incident to every case of capture, must have resulted in the complete destruction of the fruit, and that, accordingly, the claims of the owners of the lawful cargo would, in all probability, have been very large. The decision of the Court of Appeals, conceding that the ship would have been bound to pay such claims, holds her liable here for refusing to take such risks, and to rely on the Italian Government for indemnity in case of misadventure. The decision of the Court on this point appears so extraordinary, so unreasonable, and in such manifest conflict with the ordinary duties and obligations of the master of a general ship, and with the decision of this Court in the case of *Holladay* v. *Kennard* (12 Wall., 254), that this Court should correct the error.

XI.—The Court of Appeals also erred in refusing to hold that the ship was exonerated from all liability in these cases under and by virtue of clause (*b*) of the bills of lading (*ante*, p. 6), which provided that under circumstances affecting the safety of the voyage, the master in his discretion might land the goods and store them at the risk and expense of the shipper, and that the master and the owners should thereby become discharged from all responsibility.

The District Court held that this clause was applicable to the extraordinary circumstances existing in these cases, but failed to relieve the ship from liability under it, owing to an apparent misapprehension of the facts as to when the assurances were given by the Spanish Government that the temporary arrangement, to allow sulphur to pass, which was reached on May 6th, would be made permanent and would not be revoked without previous notice, which was not until May 31st (pp. 236–237).

The decision of the Court of Appeals, while reversing the decision of the District Judge, is not clear as to the effect of clause (*b*) of the bill of lading.

In one part of the opinion the Court said:

> "We do not find it necessary to discuss this branch of the case [the effect of clause (*b*)] because we find in clause (*a*) [the exception of restraints of princes] abundant authority for a refusal to carry forward the sulphur while such a condition of affairs existed as that already described as being generally known to exist when the discharge began on April 27th" (p. 342).

In the end, however, the Court of Appeals necessarily does determine that clause (*b*) was inapplicable to the case; because if it were applicable there would be no liability on the part of the ship, inasmuch as master acted in strict accordance with it, whereas the ultimate decision of the Court of Appeals is to fix a very large liability on the ship as for a breach of contract.

Under circumstances strikingly similar to those in the present case, and where the clause in question was practically indentical in form, Mathew, *J.*, in the case of *Nobel's Explosives Co.* v. *Jenkins* (1896), 2 Q. B., 943, held that the peril of capture just outside of Hong Kong on a voyage between that port and Yokohoma was within the meaning of the clause providing that if the master considered it unsafe to enter and discharge cargo at the port of destination, he might land and store the goods at any safe port, and thus be relieved from all further responsibility. It was there determined accordingly, that where such a peril of capture existed, the ship was discharged from all liability towards the goods by landing and storing them in Hong Kong under this clause.

The decision of the Court of Appeals, in practical effect, necessarily amounts to a refusal to follow Mr. Justice Mathew's decision.

It is submitted that the clause in question was applicable as the District Judge found, and that on the undisputed facts of the case, the vessel should have been relieved from all liability by the force and effect of the special clause (*b*) of the bill of lading.

XII.—The Court of Appeals committed a grave error in reversing the decision of the District Judge as to the measure of damages under the clause in the bill of lading which limited the shippers' liability to the invoice value of the goods, and under the stipulation of August 12, 1898, which provided that the net proceeds of the sale of the cargo pending the suit should be credited on the judgments recovered by the libelants, if any (*ante*, p. 7).

The District Judge held the libelants were entitled to recover "the whole damages, *i. e.*, the invoice value as limited by the bill of lading which was adopted in the stipulation" [of August 12th] (fol. 1179).

This result proceeded from the finding that there was a complete breach of the contract to carry and

deliver; that the damages for such breach were limited to the invoice value of the goods, and that against the damages so ascertained, the net proceeds of the sale of the cargo should be credited under the stipulation of August 12th (fols. 778–779). The assessment of the damages on this basis by the Commissioner was expressly approved by the Court (*Commissioner's report*, fol. 1111: *Opinion affirming report*, p. 295).

The Court of Appeals reversed this ruling and held that the forwarding of the goods under the agreement of August 12, 1898 (p. 197), had the same legal effect as though the goods had been brought forward by the carrier without the reservations and conditions embodied in that stipulation, and accordingly decided as follows:

"The measure of damages in such cases is well settled. The loss is the difference between the price the goods actually brought and the price they would have brought had they been sold on the day when they should have arived" (p. 349).

It happened that by reason of the outbreak of war there was a great demand for sulphur in June, in consequence of which the price is said to have advanced from $18.50 a ton to $30 and $35 a ton, while the price in October, when the goods were finally brought forward for sale under the terms of the stipulation of August 12th, had again fallen to the normal figure of about $18.50 a ton. The decision of the Court of Appeals, if sustained, would award damages to the libelants for the amount of such profits in excess of the invoice value to the extent, probably, of about $25,000.

In reversing the decision of the District Judge, the Court overruled a number of decisions of the District Court for the Southern District of New York and of the District of New Jersey, dealing with the invoice value clause in cases of partial loss (The *Hadji*, 18 Fed. Rep., 459; affid. in 20 Fed. Rep., 875; *Pearse* v.

Quebec S. S. Co., 24 Fed. Rep., 285; The *Lydian Monarch*, 23 Fed. Rep., 298).

The District Judge, however, did not hold that these were cases of partial loss. His decision was that the "whole damages" were recoverable by reason of the non-delivery at the end of the *Styria's* voyage, and that the proceeds of the sale of the cargo when forwarded under the stipulation by another vessel, should be looked ot only as providing a credit to be set against the damages thus ascertained (p. 295). This was the correct rule of law (*Smith* v. *Tregarthen*, 56 L. J., Q. B., 437), and was in exact accordance with the terms of the stipulation itself that "the goods upon arrival to be sold at current market rates and the proceeds, less charges incurred, to be credited on account of the damages, if any, recovered in these cases by the libelants" (fol. 788).

This petitioner applied for a rehearing in the Court of Appeals, on the ground that the decision as to the measure of damages was contrary to the terms and spirit of the stipulation of August 12th, under which the goods were brought forward for sale on the terms and conditions therein stated (*Petition*, pp. 352-359).

In view of the reservations of the stipulation it was pointed out to the Court that the intention was that the cases should be dealt with, and the damages for non-delivery, if liability was established, should be measured precisely as though the stipulation had not been made, and the cargo had not subsequently been brought forward; and that only after this had been done should the stipulation be looked at to ascertain the amount of the credit to be set against such damages.

The application for a rehearing was granted (p. 360) and a reargument was had. The opinion, filed after the reargument (pp. 363-364) reaffirmed the previous decision, holding in effect that if the cargo had not been brought forward the ship's liability would not have been limited to the invoice value of the goods

by the clause contained in the bill of lading (p. 363). It further decided that the parties did not intend, by the stipulation, that which had been explicitly provided in it, namely, that the proceeds of the sale should be credited against the judgments recovered by the libelants (p. 364).

If the Court of Appeals meant to determine, merely, that in measuring the amount of the whole damages recovered by the libelants the invoice value clause was void, it would appear that a clear error had been committed that should be corrected; while, if the decision is rested on the proposition that the stipulation, deliberately drawn and signed by five counsel, did not express the mutual intention of such counsel, clearly this Court should pronounce its judgment on the case; for it is a matter of the highest importance that the rights of parties as determined by the stipulation of their counsel, during the pendency of the trial, should be adjudged in accordance with such stipulation.

XIII.—More specific reference will now be made to the errors in the decision of the Court of Appeals on the matter of the damages.

(**a.**) The clause limiting the ship's liability to the invoice value has been adjudged to be valid by the previous decisions of this Court (*Hart* v. *Pennsylvania Railroad Co.*, 112 U. S., 331, 337; *Calderon* v. *The Atlas Steamship Co.*, 170 U. S., 272, 278).

Though it is no doubt true that this clause would not limit the damages in any case of fraud by the ship, as suggested by Lacombe, *J.* (p. 363), yet this was not such a case. It was not even a case of conversion. On this point the District Judge's conclusion was better considered. He said:

"There was no conversion of the goods, only a mistaken theory of the contract rights and duties" (fol. 1179).

If the goods had arrived and had been delivered by mistake to the wrong consignee, the clause limit-

ing the ship's liability to the invoice value would have applied. It should apply equally in a case where, from a mistaken belief as to his rights, the carrier, under such extraordinary circumstances as here existed, assumed to terminate the contract under the special clause (*b*) above referred to (*ante*, p. 6), and failed to make any delivery in performance of the original contracts. There was nothing willful or tortious in the carrier's action, much less was there any suggestion of fraud.

The four learned Judges who have heard the case have not agreed among themselves as to what the master's rights and duties really were. It cannot be said, therefore, that any mere mistake the carrier may have made was such as to vitiate the stipulation in the bill of lading limiting the ship's liability for such mistake to the invoice value of the goods.

(**b**.) The issues stated in the pleadings presented cases of *non-delivery* and liability therefor, *not of delay in delivery* and of damages for such delay.

The opinion of the Court of Appeals ignores the issues as defined and awards damages on the basis of an issue not stated by the parties and not actually tried. Not a word of evidence was taken by either party as to whether the delay that actually occurred in the arrival of the goods was reasonable or unreasonable, or was such as to give rise to any liability, if the cases had been brought to recover damages for delayed delivery.

The libels of Morgan (fol. 21) and of Malcomson (fol. 129) allege non-delivery and claim damages on that basis. The libels of Parsons (fol. 72) and of Munroe (fol. 186) both allege a conversion and claim the value of the goods.

If, as they stated, the libelants intended to claim damages for non delivery of their goods, at the end of the voyage on which the goods were shipped, such damages would be measured by the provision of the bill of lading that the ship's liability shall be limited to the invoice value of the goods.

The answers of the claimant are uniform in all the cases. They do not seek to change the theory of the actions, in consequence of the stipulation, or of any act done under it. They allege (*a*) the master's justification for his action (fols. 31-39); (*b*) the defense of restraints of princes (fol. 40); (*c*) a defense under a clause in the bill of lading providing that "the shipowner is not to be liable for any damage to any goods which are capable of being covered by insurance" (fol. 40), and then set up the defense arising under the clause (*p*) of the bill of lading that

> "The shipowner is not to be liable * * * in any case for more than the invoice or declared value of the goods, whichever shall be least."

In connection with that defense, the claimant sets out the stipulation of August 12th, alleging that the cargo has been brought forward under it and sold by the libelants, and "that libelants have realized, by the sale of the said sulphur, more than its invoice price, and that, accordingly, under the above quoted provision of the bill of lading, the libelants have not suffered any damages in the premises which are recoverable in this action" (fols. 42, 43).

It is perceived that the claimant did not consider the case, as stated in the libels, was varied in any way by the stipulation of August 12th, except that the ship thereby became entitled to be credited with the proceeds of the sale of the sulphur against the libelants' claim for non-delivery, which, it was contended, must be limited to the invoice value.

The libelants made no move to amend their pleadings after the sulphur was brought forward under the stipulation, and it was never claimed by them, at any time, that by reason of the stipulation, the nature of the actions was changed from the original claim of damages for *non-delivery*, to the theory of damages for *delay in delivery*.

The Court adverts to the fact that at the time the stipulation of August 12th was entered into the an-

swers had not been filed. This is true, but it is unimportant, because the bills of lading in most cases were annexed to the libels, and in all the cases the master had been examined, and all the bills of lading had been produced and put in evidence (fols. 400, 404), on the 8th of June (fol. 386). It is clear, therefore, that all the proctors were fully informed of the clause in the bill of lading limiting the ship's liability to the invoice value long before the stipulation was made.

It is plain that the case as defined by the issues, related solely to the ship's liability for non-delivery of the goods.

The agreement of August 12th explicitly states that:

"This stipulation and anything done by any party under it, shall be deemed to be wholly without prejudice in the pending suits except as herein provided" (fol. 791).

The provision for forwarding the cargo was defined to be for the stated purpose of converting it into cash to abide the result of the suit. The goods on arrival were to be sold at current market rates and the proceeds, less charges incurred, were to be credited on account of the damages, if any, recovered in these cases by the libelants (fols. 778, 779).

It is manifest that neither party had any thought of bringing the cargo forward except on the terms of the agreement of August 12th, and that if that arrangement had not been reached, the cargo would have remained where it was until the trial. Both parties thought they were right in their contentions in the suits, and if the *status quo* existing when the stipulation was made had continued until the trial, it seems plain that the ship's liability would have been limited to the invoice value of the goods, and that on satisfaction of decrees for that amount the title to the sulphur would have been transferred to the shipowner (*Hagerstown Bank* v. *Adams Express*

Co., 45 Penn. St., 417; *Insurance Association* v. *Armstrong*, L. R. 5 Q. B., 244; *Mobile Railway Co.* v. *Jurey*, 111 U. S., 584, 549).

This would have also been the result if the decrees had been based on a technical conversion. Payment of a judgment recovered by the plaintiff in trover for the value of the goods, or the amount which the jury awards for the value, operates to divest him of his property in the chattels converted, and to transfer his title to the defendant (*Campbell* v. *Phelps*, 1 Pick, 61; *Brinsmead* v. *Harrison*, L. R., 6 C. P., 584; *Elliott* v. *Hayden*, 104 Mass., 180; *Marsden* v. *Cornell*, 62 N. Y., 215; *Thayer* v. *Manley*, 73 N. Y., 305; *Baltimore Marine Ins. Co.* v. *Dalrymple*, 25 Md., 307; *Lovejoy* v. *Murray*, 3 Wall., 1; *Cooper* v. *Shepard*, 3 C. B., 266

It was, therefore, prejudicial to the ship for the Court to hold that the forwarding of the goods under the stipulation changed the nature of the cases from actions for non-delivery to actions for delayed delivery, because the measure of damages, as determined by the Court of Appeals, is different in the two cases, while the stipulation itself provided that nothing done under it should be prejudicial to either party.

Under the present decision the libelants may keep the proceeds of sale, which approximately equal the invoice value of the goods, and may also recover a loss of profit, which the Court says will exceed $20,000 (p. 364); while, if the shipowners had not brought the cargo along in the *Abbazia*, it seems clear that the libelants would have recovered no profits, but only the invoice value of their goods. The result reached by the Court of Appeals flows from an act done by a party under the stipulation, and hence violates the provision that "this stipulation and anything done by any party under it shall be deemed to be wholly without prejudice in the pending suits" (fol. 791).

(c.) The Court of Appeals failed to observe the spirit and the terms of the stipulation of August 12th in looking at an act done under it (the forwarding of the cargo by the *Abbazia*) as one of the material facts on which it rested the finding that the measure of damages should be the difference between the price the sulphur would have brought if sold *ex Styria* in June, and what it brought when sold *ex Abbazia* in October.

It is plain that this measure of damages could not have been adopted if the carrier had not sent the goods forward as he did under the stipulation. In view of the reservation that "this stipulation and anything done by any party under it shall be deemed to be wholly without prejudice in the pending suits" (fol. 791), the Court was bound to disregard all acts done under the stipulation until after it had determined all questions in the suits on the facts as they were before the stipulation was entered into. In other words, the Court should have closed its eyes altogether to the fact that the cargo had been forwarded, *pendente lite*, and should have determined the cases on the issues as they stood before or on August 12th, and without regard to what was done under the stipulation. That was what the stipulation meant to provide by its reservation that all acts done under it should be without prejudice. The sole intended effect of the stipulation was to provide that after the cases had been decided without regard to what was done under it, a credit of the amount of the proceeds of the sale of the cargo should be set over against any damages that the libelants should be adjudged entitled to recover on the causes of action for non-delivery as defined in the pleadings.

The objects and provisions of the stipulation were disregarded or lost sight of in the first opinion; and in the second opinion the Court bluntly refused to give effect to it, for reasons which are far from being satisfactory.

(**d.**) The Court of Appeals adopted a wrong principle, even on its own reasoning, in treating the case of non-delivery followed by the forwarding of the goods in another vessel, like a delay in carrying the cargo to destination in the original vessel, and in determining that the measure of damages in a case of transshipment is the same as in cases of delayed delivery by the same vessel (*Smith* v. *Tregarthen*, 56 L. J., Q. B., 437; 6 Asp. Mar. Cas., 137).

In that case the defendant, the master of the steamer *Carbis Bay*, lying at Wilmington, signed bills of lading for 400 bales of cotton, "shipped on board" his vessel for Liverpool. In consequence of insufficient room only 165 bales could be shipped, and the defendant directed that the 235 remaining bales be shipped by the *Wylo*, lying in the same port, and also bound for Liverpool. The *Carbis Bay* reached Liverpool on the 26th of October, and the *Wylo* on the 29th of October, and the whole 400 bales were delivered to and accepted by the holders of the bills of lading. Between the 26th and the 29th of October, the price of cotton fell, and the plaintiffs sued the defendant to recover the loss thus occasioned. Damages for loss of market by delay in delivery are not recoverable in England against carriers by sea (*The Parana*, 2 P. D., 118; 3 Asp., 399; *The Notting Hill*, 9 P. D., 105; 5 Asp., 241). It was held by Day and Wills, *JJ.*, that on the 26th of October the plaintiffs had a right of action for non-delivery; that the measure of damages was the market value of cotton on that day, and that the subsequent delivery by the *Wylo* could only be taken into account in reduction of damages.

The only difference between that case and these is that here the measure of damages for non-delivery *ex Styria* was the *invoice* value, instead of the market value. The Court of Appeals should have followed the rule of the English case, and should have held that the subsequent delivery by the *Abbazia*, October 6th, could only be taken into ac-

count in reduction of the damages which accrued June 3d for non-delivery *ex Styria*, as limited by the invoice value. That was the rule adopted by the District Judge. The proceeds of sale of the cargo *ex Abbazia* about equalled, if they did not exceed, the invoice value (fols. 1044, 1052, 1064–1065, 1111); and accordingly the libels should have been dismissed.

(e.) The reasons assigned by the Court of Appeals for its refusal to give effect to the stipulation of August 12th are insufficient.

The Court states that if the claimant had failed to bring the cargo forward the owner could have withdrawn it from the Sicilian warehouse, paying the *Styria's* lien for expenses and freight, and could have brought it forward himself or sold it in Sicily (p. 363). No doubt he might have adopted either of those courses at any time prior to the payment by the ship of final decrees for the adjudged value of the sulphur; but if he had done so, would the measure of damages have been? Not damages for delay in delivery, because the forwarding of the goods by the goods owner would not have constituted delivery by the ship in any sense. The damages recovered from the ship would have been such as the Court would have awarded for non-delivery, less what the goods owner had realized by bringing the goods forward himself (*Smith* v. *Tregarthen*, 56 L. J., Q. B., 437); and in determining the measure of the ship's liability the invoice clause would have been applied. Nothing that the libelants could have done on their own initiative would have put them in a position to recover the amount of damages the Court of Appeals has awarded in consequence of the act of the shipowner in sending the goods forward by another vessel, under the conditions and limitations of the stipulation of August 12th. This fact clearly shows that the Court has put a construction on the stipulation of August 12th, which prejudices the rights of the claimant, and

hence is contrary to the provisions of the stipulation itself.

The Court also says that the language of the stipulation does not import such a one sided agreement as would result from a construction of it which would require the damages to be assessed in accordance with its terms (p. 364). Those terms necessarily imply that in fixing the amount of the damages two steps were necessary: (1) that the ship's liability and the extent of it should first be ascertained; and that then (2) against the liability so ascertained, the consignees should credit the net amount realized on the sale of the sulphur (*Smith* v. *Tregarthen*, *supra*). This is clearly imported, also, by the language of the stipulation, where it provides that—

"The claimant shall forward the cargo landed *ex Styria* at Port Empedocle, on the first available steamer from that port to New York, and shall deliver the same to the consignees, upon the terms and for the freight specified in the original bill of lading, the consignees to receive the sum and to pay the agreed freight on right and true delivery, *the goods upon arrival to be sold at current market rates and the proceeds, less charges incurred, to be credited on account of the damages, if any, recovered by the libelants*" (fol. 788).

It is further suggested by the Court that the construction of the stipulation contended for by the claimant, would have the effect of destroying the libelants' right to relief "so that although, concededly, they have lost over $20,000 through the ship's misconduct, they cannot recover anything, while by the same stipulation the ship gives up nothing" (p. 364).

As a matter of fact, the ship "gave up" more than $5,000, under the stipulation of August 12th, in paying charges on the sulphur and the cost of reloading it and forwarding it, which was disallowed to her in the District Court. The most cursory examination of the stipulation will show that it embodies a contract based on perfectly valid considera-

tions. That the effect of the stipulation was to deprive the libelants of the right to recover profits, resulted not from the stipulation itself, but from a clause in the bill of lading (which was adopted in the stipulation) limiting the ship's liability to the invoice value, and thus rendering entirely immaterial for the purposes of the contract of carriage or of the stipulation of August 12th, any question in regard to profits (*Hart* v. *Penn. Ry.*, 112 U. S., 331, 340).

The suggestion that the construction contended for by the claimant would result in a double deduction of the invoice value (p. 364), is plainly incorrect. The real point is not a question of double deduction, but of ascertaining in the first place the measure of the ship's liability. Against that liability as finally measured, the stipulation distinctly provided that there should be a credit of the net proceeds of sale. If the Court attempted to measure the primary liability in a way that led to a duplication of the credit of the proceeds of sale, that was due to the fault of the Court in adopting a rule plainly inconsistent with the language of the stipulation, and was not due to the stipulation itself. The error of the Court was in adopting the measure of damages which it did adopt, because after measuring the damages in that way, the credit of the net proceeds of sale, as provided in the stipulation, extinguished the damages altogether—a result which the Court considered unreasonable. If the Court had adopted the proper rule for measuring the damages, as stated by the District Judge, and had then credited the proceeds of sale, as was done in the District Court (excepting a slight error in regard to the freight), a result would have been reached that would be perfectly consonant with the language of the stipulation.

XIV.—The petitioner avers that questions of gravity and importance are involved in these causes sufficient to justify the exercise of the jurisdiction vested in this Court to issue writs of *certiorari* re-

quiring causes to be brought here for review from the Circuit Court of Appeals.

The question of the effect of the exception of "restraints of princes," as applied to the transportation of goods that have become contraband after shipment has never, it is believed, been considered by this Court. The special clause (*b*) (*ante*, p. 6), commonly called the "War Clause," now in very general use in steamship bills of lading, has never been before this Court for construction. The question of the proper measure of damages, as it arises under the extraordinary circumstances of this case, involving a claim for profits due to the accidental and adventitious inflation of the price of sulphur in consequence of the unexpected outbreak of war, is also novel in this Court. Finally, it is important that the differences of view between the Court of Appeals for the Second Circuit and the District Courts of the Second and Third Circuits in regard to the invoice value clause in bills of lading should receive consideration.

No prejudice can result to any of the parties in interest by reason of the allowance of the writ, as all parties are fully secured by bonds which carry interest.

XV.—Your petitioner presents herewith a certified copy of the transcript of record returned from the District Court to the United States Circuit Court of Appeals for the Second Circuit, and of the record in the last named Court.

Wherefore, your petitioner prays that this Honorable Court will cause the writ of *certiorari* to be issued pursuant to the power vested in this Court by the judiciary act approved March 3, 1881, requiring the said United States Circuit Court of Appeals, for the Second Circuit, to certify the whole record and cause to this Court for consideration, and that there-

upon this Court will decide the whole matter in controversy between the parties.

And your petitioner will ever pray, &c.

ANTONIO G. SCOPINICH,
Petitioner,
By CONVERS & KIRLIN,
his Proctors.

STATE OF NEW YORK, }
County of New York. } ss.:

E. B. CONVERS, being duly sworn, makes oath and says: That he is one of the procters for the petitioner herein; that he has read the foregoing petition, and that the same is true to the best of his knowledge, information and belief; and that the reason why this petition is not verified by the petitioner is that the petitioner is absent at sea, and that the owner of the *Styria* is an Austrian corporation, and has no officer or agent in this country. He further says that this petition is made and presented by due authority, and that the application is meritorious, and is not made for the purpose of delay.

E. B. CONVERS.

Subscribed and sworn to }
before me, this 25th }
day of May, 1900. }

JAMES T. KILBRETH,
Notary Public,
[SEAL.] New York County.

I hereby certify that I have examined the foregoing petition, and that, in my opinion, it is well founded, and is entitled to the favorable consideration of the Court.

J. PARKER KIRLIN,
Advocate.